Supreme Court, U.S.
FILED
OCT 27 1997

No. 97-544

In The Supreme Court Of The United States

OCTOBER TERM 1997

NOVA DESIGNS, INC., d/b/a PERFORMANCE DIVER,

Petitioner,

v.

ELECTRONICS INSTRUMENTATION AND TECHNOLOGY, INCORPORATED, and BEUCHAT USA, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT ELECTRONIC INSTRUMENTATION AND TECHNOLOGY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision by the Court of Appeals unanimously affirming the entry of a final summary judgment against all of Petitioner's claims once Petitioner failed to present any triable issue of fact in this routine anti-trust case presents a conflict between any of the United States Courts of Appeal on any important matter or so far departs from the accepted and usual course of judicial proceedings as to mandate review by this Court.

PARTIES TO THE PROCEEDING

Respondent, Electronic Instrumentation & Technology, Inc. (hereinafter "EIT" or "Respondent"), is a manufacturer of electronic instruments including dive computers. Petitioner, Nova Designs, Inc., d/b/a Performance Diver, (hereinafter "Performance Diver" or "Petitioner") is an affiliate corporate of Performance, Inc.. Performance Diver sells scuba diving clothing and equipment through mail order catalogs.

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STATEMENT OF THE CASE

According to the undisputed facts before the District Court, Respondent, Electronic Instrumentation and Technology, Inc. ("EIT"), a new manufacturer of dive computers, agreed to distribute its Orca brand of dive computers through sales to Performance Diver for mail order catalog resale. As part of this arrangement, EIT agreed to provide Performance Diver with a computer disk containing all of the warranty information, including customer names, arising out of prior sales of Orca computers through its retail dealers. Performance Diver ostensibly was to use this information to increase its mailing list, and thus secure a wider distribution of the Orca dive computers. EIT agreed to try this new channel of distribution as an experiment, but reserved the right to discontinue sales to Performance Diver if these sales eroded EIT's network of retail dealers.

Some time in early 1992, the Performance Diver mail order operation prepared mailing list labels for distribution of

new catalogs featuring Orca dive computers. Through some mistake, Performance Diver's catalogs contained not only the name of the retail scuba customer who had purchased the Orca computer, but also the name of the retail dive store from which the computer had been purchased. This implied that EIT's retail dealers had somehow endorsed Performance Diver's mail order catalog. EIT's retail dealers were incensed by this development, and complained to EIT.

Faced with a serious erosion in its traditional retail network, EIT simply decided to discontinue its experiment of selling dive computers through Performance Diver. Several years later, Performance Diver brought suit against EIT and several other manufacturers of scuba equipment and against a number of retail trade groups including the Scuba Retailers Association, contending that EIT's decision to discontinue sales to Performance Diver was the product of a group boycott adopted as a conspiracy in violation of Section 1 of the Sherman Act. After a year of discovery, and in response to EIT's Motion for Summary Judgment, Performance Diver

was required to come forward with some evidence, either linking EIT to a conspiracy among other manufacturers, or establishing that EIT had participated directly in a vertical conspiracy with the scuba retailers to fix or stabilize prices.

Faced with this challenge, Performance Diver simply was incapable of producing any proof on these key issues. District Court Judge Taylor thus correctly concluded that EIT's conduct was as consistent with legitimate conduct as with an inference of conspiracy, and appropriately granted summary judgment in EIT's favor. Per Judge Taylor's Order of September 12, 1995:

> Something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently. The anti-trust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."

Because this decision effectively disposed of Performance Diver's entire case against EIT, on October 19, 1995, Judge

Taylor certified entry of a final judgment pursuant to Federal Rule of Civil Procedure 54(b).

The Ninth Circuit Court of Appeals ("Ninth Circuit") unanimously affirmed this decision, finding that:

> Performance has failed to present evidence that EIT, Beuchat, or Princeton joined a conspiracy, let alone entered into an agreement on price or price levels. The evidence of the conduct of each of these defendants is at least as consistent with permissible competition as with illegal conspiracy. Receiving complaints about Performance is not enough to support an inference of conspiracy, even if the termination of business relations with Performance was in response to those complaints. [citing Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 758 (1984); Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1156 (9th Cir. 1988)]

Nova Designs, Inc. v. Electronic Instrumentation and Technology, Inc., 1997 U.S. App. LEXIS 12046 (9th Cir. 1997).

The Court of Appeals' decision was thus in accord with every other federal anti-trust decision involving mail order sales and dealer complaints, or similar distribution arrangements. See National Marine Elec. Distribs., Inc. v. Raytheon Co., 778 F.2d 190 (4th Cir. 1986); Bailey's, Inc. v.

Windsor Am., Inc., 948 F.2d 1018 (6th Cir. 1991); See also KMB Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123 (2nd Cir. 1995); Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905 (4th Cir. 1986); Jeanery, 849 F.2d at 1156.

ARGUMENT

EIT opposes issuance of the Writ of Certiorari sought by Performance Diver. This routine anti-trust case was correctly evaluated by the District Court and unanimously affirmed by the Court of Appeals under this Court's well-settled decisions.

Accordingly, the case presents no novel issues, nor any conflicts between the Circuits on any underlying issue—much less any important issue. Moreover, the decision is completely in accord with the "accepted and usual course of proceedings" under this Court's teachings. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1985); Business Elec. Corp. v. Sharp Elec., 485 U.S. 717, 724

(1988); Monsanto, 465 U.S. at 763-64. Accordingly, the petition should be denied.

I.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS CONCERNING THE PROPER APPLICATION OF RULE 54(b) AND THE PROCEDURES TO BE FOLLOWED BY THE DISTRICT COURT

In an effort to find a discrepancy between the Circuits, Petitioner has argued that there is a conflict between the Ninth Circuit and the Eleventh Circuit Court of Appeals ("Eleventh Circuit"), with respect to the proper procedures to be followed by a district court in certifying a judgment under Rule 54(b). This is not an important issue requiring Supreme Court intervention; even if it were, however, there is no conflict and no misapplication of Rule 54(b) under the circumstances presented here.

Both the Ninth and the Eleventh Circuits follow an identical rule, i.e., that in certain circumstances, particularly where it is not obvious that a case should be properly certified

under Rule 54(b), a trial court certifying a judgment as final under Rule 54(b) should state its reasons therefor. Alcan Alum. Corp. v. Carlsberg Fin. Corp., 689 F.2d 815 (9th Cir. 1982); Sheehan v. Atlanta Int'l Ins. Co., 812 F.2d 465, 468 n.1 (9th Cir. 1987); Rutman Wine Co. v. E. & J. Gallo Winery, 829 F. 2d 729, 729 (9th Cir. 1987); Ebrahimi v. City of Huntsville Board of Education, 114 F.3d 162 (11th Cir. 1997). Thus, there is no conflict between the Ninth and Eleventh Circuits on this issue.

More fundamentally, as both the District Court and the Ninth Circuit recognized below, the reason for certifying a final judgment under Rule 54(b) was obvious from the face of the Complaint and the proceedings before the District Court. The District Court's summary judgment ruling in September, 1995, and subsequent entry of a final summary judgment for EIT in October, 1995, disposed totally of all six counts filed by Performance Diver against EIT. It is true that EIT had maintained a separate counterclaim against Performance Diver based on different theories of liability; however, this

claim had an independent basis of federal jurisdiction and could have been prosecuted independently. Indeed, if it had so chosen, EIT could have brought this claim against Performance Diver in entirely separate litigation. Once the Court had decided that Performance Diver's accusations against EIT were insufficient as a matter of law, EIT was entitled to have that decision affirmed on appeal (if the Plaintiff elected to appeal), rather than have this issue remain unresolved for months or even years.

In short, there is no conflict and, in any event, Rule 54(b) was properly applied. There is no controlling novel or important federal question to be presented to this Court. In fact, the decisions below properly applied this Court's precedents.

II.

THE PETITION MISSTATES BOTH FACT AND LAW BY ASSERTING THAT IN RULING UPON THE PROPRIETY OF JUDGE TAYLOR'S ENTRY OF SUMMARY JUDGMENT FOR EIT THIS COURT SHOULD CONSIDER MATTERS THAT WERE NOT INCLUDED IN THE RECORD BEFORE THE DISTRICT COURT AT THE TIME IT GRANTED SUMMARY JUDGMENT TO EIT AND BY CHARACTERIZING JUDGE TAYLOR'S LATER REFUSAL TO GRANT OTHER PARTIES' SUMMARY JUDGMENT MOTIONS AS A "FINDING" THAT A PRE-EXISTING CONSPIRACY EXISTED

Pursuant to Rule 15 of the Supreme Court Rules, a brief in opposition to a petition for writ of certiorari must address misstatements of fact or law contained in the petition that may impact the issues that would properly be before the Court if certiorari were granted. Much of Performance's argument in the petition is based upon two faulty and misleading premises: (1) that simply because Judge Taylor denied summary judgment in favor of a scuba trade association on January 10, 1996, he somehow had found evidence of the existence of a "horizontal conspiracy"; and (2) that this subsequent ruling somehow taints or discredits his

prior judgment in favor of EIT entered months earlier, on September 12, 1995. Given the current stage of this litigation, counsel for Performance Diver must be aware that each of the above premises is entirely devoid of both legal and factual merit. This Court should reject these assertions, and deny the petition.

Taking the latter argument first, it is well settled that a ruling on a summary judgment motion must be based solely on the pleadings, the deposition testimony, and the affidavits, if any, that constitute the record before the district court at the time of decision. The Ninth Circuit has noted, "as an appellate court, our review is limited to the record presented to the district court at the time of summary judgment." E.g., Schneider v. County of San Diego, 28 F.3d 89 (9th Cir. 1994); see also U.S.A. Petroleum Co. v. Atlantic Richfield Co., 13 F.3d 1276, 1279 (9th Cir. 1994) (only the record before the District Court is normally considered; the summary judgment record cannot be supplemented on appeal).

Other circuits apply the same rule. For instance, the

Eleventh Circuit case of Clinkscales v. Chevron U.S.A, Inc., 831 F.2d 1565 (11th Cir. 1987) is instructive on the issue of what evidence is relevant to Judge Taylor's granting of summary judgment for EIT. In Clinkscales, certain testimony was produced at a preliminary injunction hearing, but not transcribed until after the district court ruled on a summary judgment motion. Id. at 1570. The Court held that, in order for the appellant to rely upon this evidence in arguing that the summary judgment was improperly granted, appellant must have produced a written transcript of the hearing to the trial judge before it made its ruling on the summary judgment motion. The Eleventh Circuit went on to explain:

> [T]he district judge need not consider evidence produced at a hearing almost two years prior to the court's ruling on the summary judgment motions where the hearing was not transcribed and made part of the record until after the court ruled and a notice of appeal was filed. Given our conclusion that testimony at the preliminary injunction hearing in this case was not part of the record properly before the district court in ruling on the summary judgment motions, we do not consider this testimony in deciding whether

> the district court erred in granting summary judgment for appellee.

Id.

The correct standard requires that in order to be part of the evidence to be considered by appellate courts in determining whether summary judgment was appropriately granted by the trial court, the relevant evidence must be part of the record before the trial judge at the time of the summary judgment ruling. In the instant case, the evidence that Judge Taylor subsequently ruled created a fact issue as to the liability of parties other than EIT was never produced in any form until after summary judgment was entered in favor of EIT. Clearly, to argue that such evidence requires the reversal of a summary judgment that was granted months earlier, misstates law and defies reason.

Second, in its zeal to find some solace in Judge Taylor's subsequent Order, Petitioner claims:

> The district court found a substantial dealer conspiracy to eliminate price competition and

> therefore denied respective summary judgment motions by the trade association and dealer defendants.

(Petitioner's Br. P. 3) No such "fact-finding" language is found in Judge Taylor's January, 1996 Order. Rather, he simply stated that as to the Scuba Retailers Association:

> [T]his evidence is sufficient only to create a triable issue of material fact on the issue. Neither side has successfully shown the undisputed facts prove either an agreement or lack of an agreement as a matter of law. Therefore, the Court denies both motions for summary judgment.

Thus, by denying summary judgment as to the Scuba Retailers Association, Judge Taylor did not find "a substantial dealer conspiracy to eliminate price competition." (Petitioner's Br. P. 3); only that, as to this defendant, issues of fact remained to be tried.

Petitioner not only misstates the text of Judge Taylor's Order, but also ignores the crucial fact that in the very same decision, he ruled in favor of the only remaining manufacturer defendant, Princeton Tectonics, on the same legal basis as in his earlier legal decision for EIT. Judge

Taylor granted summary judgment as to Princeton Tectonics because, like EIT, it had only responded to its own dealer complaints. Thus, there was insufficient evidence to link Princeton Tectonics to any alleged conspiracy. Per Judge Taylor:

> In all material respects, the allegations in Performance's complaint of Princeton's participation in the allegedly unlawful conspiracy are the same as the allegations directed against EIT and Beuchat. Therefore, the court's reasoning in the September 12, 1995, order applies with equal force to analysis of Princeton's motion for summary judgment.

Therefore, even at the time he denied the Scuba Retailers Association's motion for summary judgment, Judge Taylor remained unpersuaded that any manufacturer had "joined" any retail-level conspiracy against Performance Diver.

Performance Diver's strained interpretation of the proceedings below provides no basis for this Court to exercise its discretionary jurisdiction over this case. The courts below properly found no evidence that EIT had ever conspired against Performance Diver. Judge Taylor's Orders clearly establish that, despite the possibility that the Scuba

Retailers Association itself may somehow have boycotted Performance Diver, Performance Diver simply never produced credible evidence sufficient to create a triable issue of fact to link a manufacturer such as EIT to any such alleged conspiracy. The rulings of the District Court and of the Court of Appeals for the Ninth Circuit were entirely consistent with every other similar case. See National Marine Elec. Distribs., Inc. v. Raytheon Co., 778 F.2d 190 (4th Cir. 1986); Bailey's, Inc. v. Windsor Am., Inc., 948 F.2d 1018 (6th Cir. 1991); See also KMB Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123 (2d Cir. 1995); Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905 (4th Cir. 1986); Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148 (9th Cir. 1988).

CONCLUSION

Petitioner's attempt to create a conflict between the Circuits fares no better in this Court than its attempt to create a triable issue of fact in the courts below. This petition presents no issue remotely requiring exercise of this Court's appellate jurisdiction. The writ should be denied.

Respectfully submitted,

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